United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

77-7131

To be argued by
DONALD F. MOONEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

ATLANTIC & GREAT LAKES STEAMSHIP CORP.,
Plaintiff-Appellee,

—*v*—

STEELMET, INC.,
Defendant,

—*and*—

TIDEWATER TERMINALS, INC.,
Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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FOR THE SECOND CIRCUIT

ATLANTIC & GREAT LAKES STEAMSHIP CORP.,

Plaintiff-Appellee,

—v—

STEELMET, INC.,

Defendant,

—and—

TIDEWATER TERMINALS, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF FOR DEFENDANT-APPELLANT

The Questions Presented

1. Whether the parties entered into a contract for the charter of the vessel MARY on November 20th, 1974.

2. Whether the two conditions precedent to said charter party, namely (a) the receiver of the cargo approving the

MARY before 1600 hours on November 21st and (b) the parties negotiating and agreeing to the various terms of the GENJAPSCRAP form charter party, were ever fulfilled.

3. Whether the Court below correctly applied this Court's decision in *Interocean Shipping Company* v. *National Shipping and Trading Corporation*, 523 F. 2d 527 (2d Cir. 1975), to the facts in this case.

4. Whether the Court below committed prejudicial error in receiving into evidence two telexes from plaintiff's agents in Peru which constituted multiple hearsay.

5. Whether the Court below made erroneous findings of fact in accepting plaintiff's calculations of damages (including underestimated calculations of anticipated voyage expenses it would have incurred had the MARY performed the voyage in question) and thus finding the vessel would have earned a net profit of $62,746.55.

Statement of the Case

In this action to recover damages for breach of contract sustained by plaintiff, the disponent owner of the vessel MARY, defendant Tidewater Terminals, Inc. appeals from a judgment made by the Honorable Charles M. Metzner in the Southern District of New York following a trial held on July 14, 1976, in favor of the plaintiff in the amount of $62,746.55.

Statement of Facts

In mid November, 1974 Tidewater Terminals, Inc. ("Tidewater") sought to engage a vessel for the carriage of a cargo of 9,375 long tons of shredded scrap from Jacksonville, Florida to Chimbote, Peru, sold pursuant to

a C&F contract by Tidewater's affiliate, Steelmet Export Company, and an unrelated company, Thyssen, Inc., to Empresa Siderugica Del Peru of Chimbote, Peru ("the receiver") (A. 176a).

Atlantic & Great Lakes Steamship Corp. ("Atlantic") was the time-chartered owner of the vessel MARY (A. 146a). Antra Shipping Limited ("Antra") of Montreal was the charter broker for Tidewater, and A. L. Burbank & Company (Burbank) was Atlantic's charter broker.

During oral negotiations between the brokers, Mr. Traa of Antra and Mr. Pettersen of Burbank, involving various offers and counter-offers, a telex was sent by Mr. Traa to Mr. Pettersen and subsequently relayed to Tidewater on November 20th at 7:25 P.M.

This telex, confirming terms of the proposed charter party that had been agreed up until that point in the course of negotiations, is set forth below:

> WE CONFIRM HAVING FIXED TODAY AS FOLLOWS ACC TIDEWATER TERMINALS INC
>
> MV MARY GREEK FLAG BLT 57
> 14783 DWAT
> GLESS ORECARRIER, BRIDGE BETWEEN HATCHES 2 AND 3, ENG AFT
> 5 HOLDS/HATCHES BUT CARGO ONLY TO BE LOADED IN HATCHES 2-5
> HATCH SIZES 2-5 IS 61'4" x 34"
> 374000 CFT CLEAR IN MAINHOLDS 2-5
>
> 9375 LT MINMAX SHREDDED SCRAP STOWING MAX 40/LT
> 1 SB JACKSONVILLE/1 SB CHIMBOTE
> NOV 27/DEC 9 (PRESENT ETA NOV 28)
> 2500 LT LOAD/800 LT DISCH ALL PER WWDSHEX EIU
> US 29, 25 PER LT FIOT, 95 PCT PPD
> 4500 DEM/HD LTS
> NEGOTIATIONS AND EVENTUAL FIXTURE TO BE KEPT STRICTLY CONFIDENTIAL

SUB RECEIVERS APPR OF VESSEL LATEST 1600 HOURS NOV 21
OWISE GENJAPSCRAP SUB DETS 3, 75 TTL HERE (A. 148a 150a)

It was expressly understood and agreed that all negotiations were subject (a) to approval of the vessel by the receiver of the cargo on or before 1600 hours on November 21; and (b) to the parties' agreement on the "details" of the GENJAPSCRAP charter party form. At no time did Mr. Traa, or anyone else acting on Tidewater's behalf, assure Mr. Pettersen, or anyone else on Atlantic's behalf, that the receiver would approve the vessel.

It is to be noted that the telex states that the "Negotiations and *Eventual* Fixture TO BE KEPT STRICTLY CONFIDENTIAL ~~(i.e. in caps)~~".

On the afternoon of the next day, November 21, Mr. Pettersen obtained a copy of the GENJAPSCRAP form, after having been advised by Mr. Traa that morning as to where it could be obtained (A. 39a). On November 21, Mr. Avraamides, not having conferred with representatives of the receiver, agreed to a 24 hour extension of the deadline for receipt of the receiver's approval (A. 77a).

During the afternoon of November 21 or the morning of November 22, two Sider representatives, Mr. Cesar Molina Fernandez and Mr. Javier Zegarra Zavaleta, a resident of Chimbote, met with Mr. Robert Waisfisz, a vice-president of Steelmet to discuss the shipment to Chimbote (A. 15a-16a, 22a, 69a, 182a). Mr. Molina was Sider's Superintendent of Materials and Mr. Zegarra was the head of Sider's Raw Materials Planning Department in Chimbote (A. 15a-16a). Mr. Molina had, on behalf of the receivers, executed the Purchase Order for the cargo (A. 28a, 66a, 176a). This purchase order was issued by the receivers whose facilities were located in the port of Chimbote (A. 14a, 176a, 182a). The receivers also had a Lima office, a dis-

stance of 470 kilometers from Chimbote. Molina and Zegarra had previously visited Steelmet's facilities in Jacksonville on November 16 (A. 15a). The purpose of their visits to Jacksonville and New York was to inspect the cargo of steel scrap and to expedite its shipment since it was urgently needed in Sider's mill in Chimbote (A. 16a). Mr. Avraamides noted that since scrap is "a very difficult cargo to discharge", receivers' approval is customarily sought, (A. 24a), and that the purchase order, (A. 176a), does not permit "use of ships with characteristics unsuitable for the cargo" (A. 24a).

Mr. Waisfisz called Mr. Avraamides into his office and told him, in the presence of Messrs. Molina and Zegarra, that the Sider representatives had asked what ships were available to carry the scrap to Chimbote. Mr. Avraamides replied that the MARY was available and he gave characteristics of the MARY. Mr. Avraamides then stated that the PROMETHEE was also available and he gave the PROMETHEE's characteristics[1] (A. 23a, 25a, 70a). Mr. Molina inquired which vessel would arrive soonest in Chimbote. Mr. Avraamides replied the PROMETHEE. Mr. Molina then instructed Mr. Avraamides to ship the cargo aboard the PROMETHEE (A. 17a). On the basis of Mr. Molinia's instructions, the PROMETHEE was voyage chartered by Steelmet Export from Tidewater.

Mr. Avraamides advised Mr. Traa that the receiver had declined to approve the MARY (A. 23a) and when Mr. Traa relayed this information to Atlantic's broker, Mr. Petter-

---

[1] The MARY was a Greek flag vessel built in 1957 of about 14,783 deadweight tons having a rated speed of 11 knots, with bridge midships and 5 holds but only 4 holds available for cargo. The PROMETHEE was a French flag vessel built in 1967 of about 10,389 deadweight tons having a rated speed of 15.5 knots with bridge aft and 5 holds (Pl. Exs. 1, 10; A. 146a, 162a, 150a).

sen, Atlantic was informed of this development (A. 92a). Meanwhile at 1700 hours on November 21, 1974, after the expiration of the original 1600 hour deadline for receivers approval, Atlantic telexed their agents in Lima, Peru instructing them to make inquiries with respect to the receiver's withholding its approval of the vessel (A. 49a, 154a). Atlantic's agents on November 26th replied that the receiver allegedly had informed them that they did not intervene in the fixture of the vessel (A. 156a). Such advice was relayed to the brokers. Mr. Avraamides telexed the receiver's Lima office, referred to the discussion with Mr. Cesar Molino concerning the selection of the PROMETHEE and asked them to confirm that they were accepting the PROMETHEE to perform the contemplated voyage (A. 166a-167a). Mr. Avraamides testified he sent this telex and another the following day, (A. 168a), because he needed something in writing from the receiver to confirm to Atlantic that the receivers had not approved the MARY (A. 28a, 72a, 83a).

Replying on November 28th, the receiver's Lima office, apparently unaware of the instructions of the representatives of the Chimbote office, Messrs. Molina and Zegarra, to Mr. Avraamides, (A. 72a) replied that because the purchase order was C&F they could not decide on which vessel would carry the cargo (A. 168a).

The PROMETHEE departed Detroit for Jacksonville in ballast, on November 23. She encountered delays in the Seaway and bad weather on the Atlantic and arrived in Jacksonville on December 4, (A. 74a). She completed loading and sailed for Chimbote on December 8 (id.). She arrived on December 21. Discharge was completed on January 7, 1975. If she had carried an Avonmouth grain cargo that was available, the PROMETHEE could have completed discharge and been available for another cargo on or about December 15—some three weeks sooner. De-

spite efforts to obtain a return cargo for the PROMETHEE from Chimbote, Tidewater was unable to procure a cargo at a rate to justify a fixture. Ballast expenses for the voyage from Chimbote to Port Everglades, the PROMETHEE's next loading port, were $62,385.

SUMMARY OF ARGUMENT

Point I: The Court's finding that the telex of November 20th reflected a "meeting of the minds" and constituted a contract between the parties is erroneous in that

a) the admissions of the plaintiff and the testimony of all the parties show that the telex was a ". . . confirmation of the *negotiations* we had up until that moment."

b) the November 20th telex on its face shows that it is subject to

(i) receivers approval of vessel latest 1600 hours on November 21st, and

(ii) details of a GENJAPSCRAP form of charter

c) the telex on its face shows the parties contemplated further negotiations leading to an "eventual fixture"

d) the conduct of the plaintiff and its broker shows that they did not consider that a contract existed, that they did not consider that the telex of November 20th reflected a "meeting of the minds", that they knew the receivers approval had to be obtained prior to 1600 hours on November 21st, and that they knew the details of the GENJAPSCRAP form had to be agreed by the parties.

Point II: The Court below was in error in its application of this Court's decision in the *Interocean Shipping* case to the case at bar

Point III: The approval of the receivers was a condition precedent which was not fulfilled

Point IV: The details of the GENJAPSCRAP charter were conditions precedent which were not fulfilled

Point V: The Court below was in error in relying on multiple hearsay erroneously received as evidence

Point VI: The Court below was in error in accepting plaintiff's damage calculations to find that the vessel would have earned a net profit of $62,746.55

POINT I

The Court's finding that the telex of November 20th reflected a "meeting of the minds" and constituted a contract between the parties is erroneous.

The central issue in this case is whether a telex sent to Atlantic's broker (Mr. Pettersen, of A. L. Burbank) by Tidewater's broker (Mr. Traa of Antra Shipping) and then relayed from Mr. Traa to Tidewater (A, 148a, 150a), constituted a binding contract between the parties herein. The Court below held as follows:

> "The telex used on November 20 by Antra to both parties has the same wording as found in *Interocean Shipping Company* v. *National Shipping and Trading Corporation*, 523 F. 2d 527 (2d Cir. 1975). These words are, 'Confirm having fixed. . . .' These words are used in normal everyday negotiations in the chartering of vessels and mean that there has been a meeting of the minds and that a contract exists between the parties."

For the sake of convenience part of the text of this telex is set forth below:

> ". . . NEGOTIATIONS AND *EVENTUAL FIXTURE* TO BE KEPT STRICTLY CONFIDENTIAL *SUB RECEIVERS APPR OF VESSEL* LATEST 1600 HOURS NOV 21 OWISE *GENJAPSCRAP SUB DETS* . . ." (A. 148a) (emphasis added)

The above quoted telex shows on its face that any "contract" was subject to (a) the receiver's approval of vessel latest 1600 hours on November 21st and (b) details of a GENJAPSCRAP form charter. Furthermore the telex shows that the parties contemplated further negotiations leading to an *"eventual fixture"*. Not only does the Court's decision contradict the plain language of the telex in question, but it also is contrary to the evidence adduced at the trial.

It is Tidewater's position that there could not have been a "meeting of the minds" on November 20th if (a) the receiver's approval of the vessel had to be first obtained and (b) the further details of the charter had yet to be negotiated and agreed upon, and Atlantic's broker had not even obtained, much less examined details of the GENJAPSCRAP charter, until late on November 21st.

a) The admissions of the plaintiff and the testimony of all the parties show that the telex was a ". . . confirmation of the negotiations we had up until that moment."

At the very outset of this action, Atlantic in paragraph 6 of its Complaint conceded that "The contract as agreed to between the parties provides that the vessel was *subject to the approval of the receivers*", (A. 5a), a clear admission on their part that there was no "meeting of the minds", no "binding contract", on November 20th.

Indeed a reading of the complaint suggests that Atlantic was unsure as to whether there was a final fixture and for this reason cast its complaint along the lines that Tidewater failed to cooperate in obtaining the receiver's approval or failed to disclose that it was considering chartering its own vessel, the PROMETHEE. The witnesses confirmed this admission at the trial.

It was the testimony of Mr. Pettersen, the chartering broker who negotiated on behalf of Atlantic, that the negotiations up to November 20th covered freight rate, lay dates, the basic terms of loading and discharging, freight payment and demurrage (A. 35a).

> "And the negotiations and the fixtures were subject to the receivers of the cargo approval of the vessel the following day, and *also subject to further final details* of the charter party."
>
> * * *
>
> "I was notified that the terms the charterers wish to use would be placed on a previous charter party, which I could pick up at Steelmet's office in New York." (A. 35a) (emphasis added)

Indeed, Mr. Pettersen, in contrast to the Court's finding, characterized the telex as a mere ". . . *confirmation of the negotiations we had up until that moment.*" (A. 35a) (emphasis added)

Similarly, Tidewater's broker, Mr. Traa, who actually sent the telex in question, testified that agreement had been reached on several matters but that any final agreement was "sub-details, sub-receiver's approval". (A. 91a). He, too, stated that the November 20th telex was merely to "*confirm what had been agreed up to that.*" (A. 92a) (emphasis added). Thus it is obvious from the testimony of both individuals who conducted the negotiations in

question that no final or binding agreement had yet been reached by November 20th. Indeed their testimony as to the telex is similar.

Nor can there be any doubt that either party to this action considered a binding agreement to have been reached. Atlantic's operations manager, Mr. Kerwin, who handled this matter for Atlantic and was its witness at the trial, stated that "Well, in November of 1974 the vessel was off and on and concluded *subject to receiver's approval . . .*" (A. 46a). He admitted that Mr. Pettersen ". . . did advise me that the vessel had been concluded *subject to the receiver's approval.*" (A. 47a). It was his understanding that any tentative agreement ". . . was *subject to the receiver's approval of the vessel and also subject to the terms and conditions of the* GENJAPSCRAP *pro forma charter party.*" (A. 48a) (emphasis added).

In a similar vein, Mr. Avraamides, the operations manager of Tidewater, stated that the parties' negotiations were ". . . concluded . . . on basis *subject to receiver's approval* of the vessel and subject to *sub-details. . . . That means subject details. . . . To negotiate further details on the charter party.*" (A. 68a) (emphasis added).

It was the testimony of Mr. Avraamides that all of the terms of the GENJAPSCRAP form except those in the November 20th telex still had to be worked out, i.e. every detail of the GENJAPSCRAP form still had to be negotiated (A. 68a). Again even a cursory examination of a GENJAPSCRAP charter party such as that used for the ATLANTIC FREEDOM (A. 150a) reveals that numerous material terms of the contract had yet to be finalized. Mr. Avraamides' understanding of negotiations up to that point is best summarized in his response to a question by the Court:

> Q. You are telling me that, when the fixture was issued you had no contract? A. No contract, no charter party, nothing; only that Telex. (A. 69a)

Thus we have the unequivocal testimony of every witness at the trial, both principals and both brokers involved in the charter party negotiations, that the agreement reached on November 20th with respect to certain terms of an eventual charter were subject to two conditions precedent: (a) the receiver's approval of the vessel by 1600 hours on November 21st and (b) the further negotiation and agreement as to subject details as found in the GENJAPSCRAP form. Of course their testimony was consistent with the language of the telex itself.

The law is clear that if a charter is subject to a condition, neither party is contractually bound until the subject has been removed or "lifted". *Orient Mid-East Great Lakes Service* v. *International Exports Lines, Ltd.*, 315 F. 2d 519, 522-24 (4th Cir. 1963); *A. E. Stanley Manufacturing Co.* v. *Northern Cooperatives*, 168 F. 2d 892, 895 (8th Cir. 1948).

Indeed Mr. Pettersen testified that Atlantic's first offer was itself "subject details of the charter party" (A. 36a). He further testified (A. 37a) that Tidewater's (charterer's) counteroffer to his offer had the following conditions:

> "subject to charterer's approval of hatch sizes . . . Stipulation that negotiations and eventual fixture to be kept strictly confidential and subject receiver's approval and on a modified Genjapscrap form"

He testified that since "the charterers had made their approval subject to the hatch sizes . . ." he furnished such data and made a counteroffer in which he confirmed that "we would go along with the receiver's approval . . ." but wanted a time limit. Tidewater in their next counteroffer "*lifted their subject* on the hatch sizes . . ." but otherwise repeated their prior offer and maintained their "subject

receiver's approval of the vessel latest by 4 p.m., the 21st". To such counteroffer, Mr. Pettersen testified he made another counteroffer in which "we agreed to the subject or receiver's approval by 4 p.m. on the 21st" (A. 37a, 38a). Thus it is clear that at the outset Atlantic conditioned its offer "subject to details of the charter party" and that they not only agreed to make the negotiations subject to receiver's approval but included such provision in their own counteroffers. The fact that they sought and obtained a time limit to the receiver's approval demonstrates the importance of this "subject" and that Atlantic did not want to have this condition an open-ended one. The foregoing negotiations and the testimony also shows that the "subjects", as in the case of the approval of hatches, had to be "lifted" before there was a binding contract. Atlantic's witness Mr. Kerwin used the same word "lifted" in connection with such subject. He testified as follows (A. 48a):

> Q. Did there come a time when you were advised that the alleged condition of receiver's approval had not been met? A. Yes.
>
> Q. And when was that? A. Let me see. I believe the ship was fixed subject to receiver's approval within 24 hours, and I was advised the next day, the following day, that that *subject had not been lifted.* (emphasis added)

In *Orient Mid-East Great Lakes Service, supra* at 522, the Court of Appeals held:

> "No contract, we conclude, evolved from these events which constituted the fact findings of the District Court. Our determination rests primarily on this legal theorem: when an offer or a counteroffer is accepted subject to a condition or reservation, neither party is bound to an agreement until

> the condition or reservation has been withdrawn or satisfied. *Iselin* v. *United States*, 271 U.S. 136, 139, 46 S.Ct. 458, 70 L.Ed. 872 (1926); *Nolan Bros. Inc.* v. *Century Sprinkler Corp.*, 220 F. 2d 726, 728 (4 Cir. 1955); *United States* v. *Mitchell*, 104 F. 2d 343, 346 (8 Cir. 1939); *Hoffstot* v. *Dickinson*, 166 F. 2d 36 (4 Cir. 1948); Corbin Contracts §§90-92 (1952).
>
> * * *
>
> Until the original reservation had been settled or retracted, owner was not obligated to any contract whatsoever or to the pursuit of further intercourse. *Iselin* v. *United States*, supra, 271 U.S. 136, 139, 46 S.Ct. 458, 70 L.Ed. 872 (1926); *Nolan Bros. Inc.* v. *Century Sprinkler Corp., supra*, 220 F. 2d 726, 728-729 (4 Cir. 1955)"

In *A. E. Staley Mfg. Co., supra* at 895, the Court of Appeals held:

> "In the law of contracts the intent of the parties must be looked to and a contract is not made so long as both parties anticipate that something remains to be done to establish contractual relations. As said by the author of the article on Contracts, 12 American Jurisprudence, Sec. 23, p. 519, 'A contract is not made so long as in the contemplation of both parties thereto something remains to be done to establish contractual relations.'"

b) The November 20th telex on its face shows that it is subject to (i) receiver's approval of vessel latest 1600 hours on November 21st, and (ii) details of a GENJAPSCRAP form of charter.

The Court below, although finding that the November 20th was "subject to the receiver's approval by 4 P.M. on November 21, 1974 and subject to *agreeing in* details in a GENJAPSCRAP form of charter" (A. 139a, 140a), seized upon the words "confirm having fixed . . ." which preceded the particular terms which had been agreed at that point. It then, contrary to its finding that the deal was subject to agreeing on the details, held that the "addition of the words 'sub details' does not create a condition precedent for a meeting of the minds . . ." citing the decision of this Court in *Interocean Shipping* and stating that the two cases were in this respect similar (A. 142a, 143a). As will be shown in Point Two the *Interocean Shipping* decision was incorrectly applied in this case. The Court then speculated that the details "could have been taken care of on November 21 . . ." (A. 143a). There is no basis for such conjecture by the Court. The details were many and substantial and will be discussed in Point IV.

The Court below then dealt with the second "subject" of receiver's approval by confirming that it was "required" but dismissing it because it was not satisfied as to "why such a condition was placed in the 'fix' . . .". *Why* it was placed there, is not a controlling consideration. Both parties agreed to it and accepted that it was a condition. They understood what the words meant. It was not the District Court's perogative to disregard such a "subject" because it was not satisfied as to "why" the parties agreed to the condition. Thus the Court below has "lifted" both subjects and in effect bound the parties when they themselves did not intend or consider themselves so bound. The Court goes on in its opinion to suggest that the ap-

proval wasn't required by the contract between Sider and Steelmet Export. But Atlantic and Tidewater had agreed that it was a condition. Indeed even the Court's finding that the approval wasn't required is contrary to the provision of the purchase order which barred "use of ships with characteristics unsuitable for the cargo" (A. 176a, para. 1c of English translation), the testimony of Mr. Avraamides (A. 24a) and the conduct of Atlantic's representatives who had accepted the condition and sought to lift the condition by contacting their agent in Peru and arguing that their vessel was "ideal for such trade."[2]

c) The telex on its face shows the parties contemplated further negotiations leading to an *eventual fixture*.

The word eventual is defined in Webster's New World Dictionary (concise edition) as follows:

"1. depending on events; contingent or possible".

The Court below may have overlooked and, in any event, made no reference in its decision to that part of the telex of November 20th which provided that "negotiations and eventual fixture to be kept strictly confidential . . .". The fair intendment of such phrase is that the negotiations had not yet resulted in a final fixture. The phrase connotes futurity. Atlantic's broker testified that a prior counteroffer of Tidewater contained the same stipulation (A. 37a). Certainly such earlier reference to "eventual fixture" in a counteroffer with not two but three subjects reflected the recognition by the parties that a fixture

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[2] Atlantic's telex to their agent (A. 154a) neglects to mention the fact that their vessel's bridge was located between No. 2 and No. 3 holds, that the vessel had a fifth hold but could not load cargo in it, that she had a deadweight capacity of 14,783 tons for a cargo of 9,375 tons or that she was 17 years old with a speed of 11 knots, all adverse factors that would affect her suitability.

had not yet been made. Atlantic then arranged to lift one of the three subjects (approval of hatch sizes). One down, two to go. The repetition of the phrase in the telex of November 20th reflected the continued recognition that a fixture had not yet been made.

d) The conduct of the plaintiff and its broker shows that they did not consider that a contract existed, that they did not consider that the telex of November 20th reflected a "meeting of the minds", that they knew the receiver's approval had to be obtained prior to 1600 hours on November 21st, and that they knew details of the GENJAPSCRAP form had *to be agreed by the parties.*

It is clear not only from the testimony of the parties as hereinbefore set forth that at the time the November 20th telex was issued the parties considered the words "subject to receiver's approval" to be a condition precedent which had to be satisfied before a binding agreement could take place, but it is equally clear from the conduct of the parties themselves, that they both accepted this subject to be a condition precedent. There is no other logical explanation for the fact that the time for obtaining the receiver's approval of the vessel was extended by 24 hours (A. 92a). If there had already been a complete fixture it would have been unnecessary for the parties to agree to an extension of time for said receiver's approval. Additionally the conduct of Atlantic in making extensive efforts through its agent in Peru on November 21st to investigate the matter of approval clearly demonstrates that in its mind there was no binding fixture on November 20th because a necessary condition precedent had not been satisfied (A. 49a, 154a) and they wanted to try to obtain such approval themselves before the expiration of the time limitation.

Regarding the second condition precedent, namely the subject details of the GENJAPSCRAP form, it is readily apparent from an even cursory examination of the various charter parties offered in evidence at the trial (A. 10a, 12a, 146a, 150a, 162a, 164a), that there were numerous vital details to be added and deleted before the parties reached agreement on all of the essential terms of a charter. Mr. Pettersen testified that he did not pick up the ATLANTIC FREEDOM charter party until after 3:00 P.M. on November 21st (A. 31a). Therefore, it was impossible that the parties could have satisfied the requirement of reaching a meeting of the minds on *all* of the essential details of the charter party as early as the 20th. Furthermore, the very fact that he felt it necessary to get this charter party form shows he believed further negotiations were still necessary. Indeed, Mr. Traa testified as to his past experience that charter party negotiations have sometimes failed due to the principals' inability to agree on charter party details. including GENJAPSCRAP details (A. 91a).

Mr. Pettersen's conduct after obtaining the ATLANTIC FREEDOM charter from Tidewater is also indicative of his state of mind that GENJAPSCRAP details were still to be negotiated and ultimately agreed upon before an eventual fixture could be consumated.

He testified that:

> "The Atlantic & Great Lakes—the disponent owner or the owner, as far as I am concerned, gave me quote a flexible authority to accept terms and *I went over* the charter party. The only thing that I did not wish to *take completely on my own* was the clause regarding the extra insurance. However, I discussed it with the owner and we agreed, and I subsequently notified Mr. Traa on the phone—it must have been late that afternoon—that as far as the owner was concerned, there were no objections

> to the terms of the ATLANTIC FREEDOM charter party as applicable to our trade. . . . *This would have been late on the 21st.*"
>
> * * *
>
> "In this charter party, its Clause 33, which reads that 'Any extra insurance on account of the vessel's age, classification, flag or ownership to be for vessel's account, and charterers may deduct same from freight.
>
> Knowing that there would be extra insurance on this cargo I told Mr. Williams about it, but we had chartered several of these similar ships before with that clause and we accepted it as part of the trade." (A. 40a) (emphasis added).

It is incongruous to accept the November 20th telex as a "meeting of the minds" when Atlantic's own broker unequivocally testified that since he did not have the authority to obligate his principal to pay extra insurance he felt compelled to consult with said principal late on November 21st. The only logical explanation for Mr. Pettersen's action in this regard is that he understood that he needed his principal's authorization before he could accept this clause, and that this clause, as well as the other outstanding GENJAPSCRAP details, had to be settled between the parties before any meeting of the minds could be reached, and a binding agreement entered into.

That this insurance clause was a material term of the contract is not in doubt when one considers that the cost of the extra insurance, conceded to be $5,589 (A. 116a), constitutes approximately 9% of Atlantic's anticipated net profit (A. 122a). Mr. Avraamides confirmed Mr. Pettersen's testimony on this point stating that ". . . we didn't reach the negotiations with the owners for that clause yet. . . . Usually this clause is never accepted by the owners and we never reach (sic) negotiations for that clause

yet." (A. 79a). Later, on cross-examination he again repeated ". . . I had never reached negotiations with the owners at that point" (A. 85a).

Thus it can be seen from the conduct of (a) Mr. Pettersen in obtaining the GENJAPSCRAP form used in the ATLANTIC FREEDOM charter party, and reviewing its terms, and in particular deeming it necessary to obtain Atlantic's approval of the overage insurance clause, *on November 21st* and (b) Mr. Kerwin in investigating the matter of the receiver's approval and attempting to obtain same *on November 21st,* that Atlantic considered no "meeting of the minds" or "binding agreement" to have been entered into on *November 20th.* Atlantic's activities can be logically explained in only one way—it understood that both conditions precedent had to be lifted *before* a binding charter with regard to the MARY was reached.

POINT II

The Court below was in error in its application of this Court's decision in the Interocean Shipping case to the case at bar.

Although the record reveals that the parties did not consider that a final contract had been made on November 20th, the Court below apparently considered the case of *Interocean Shipping Company* v. *National Shipping and Trading Corporation*, 523 F 2d 527 (2d Cir. 1975) to be controlling. In his opinion Judge Metzner stated:

> The telex used on November 20 by Antra to both parties has the same wording as found in *Interocean Shipping Company* v. *National Shipping and Trading Corporation*, 523 F. 2d 527 (2d Cir. 1975). These words are, "Confirm having fixed. . . ." These words are used in normal, everyday negotiations in

> the chartering of vessels and mean that there has been a meeting of the minds and that a contract exists between the parties. The statute of frauds does not exist in the law of admiralty. The addition of the words "sub details" does not create a condition precedent for a meeting of the minds and the execution of a written contract. (A. 142a).

However it was erroneous to interpret the holding in the *Interocean* case to mean that the inclusion of the phrase "sub-details" never creates a condition precedent in a fixture telex. The facts of the *Interocean* case and the instant case are clearly distinguishable. Judge Metzner's misunderstanding of the *Interocean* case is demonstrated in the transcript itself. The Court stated: "I want to get this straight. You are telling me that when the fixture was issued you had no contract?" As set forth above, Mr. Avraamides stated that the phrase sub-details meant that everything except that which had been agreed upon was still to be negotiated by the parties. Judge Metzner reacted "That isn't what our Court of Appeals had said" (A. 69a), an obvious reference to the *Interocean* case. Indeed we submit that the Court's premature equation of the alleged fixture telex of November 20th with a contract, based on misconception of the *Interocean* case, and Mr. Avraamides' rejection of the Court's view, colored the Court's consideration of Tidewater's evidence and prompted him to accept double hearsay evidence from Atlantic that conformed to his view of the case.

In the *Interocean* case (at 535), this Court did not disturb the District Court's finding that "Mobile time sub details" did not constitute a condition. However, it pointed out that the District Court had "credited De Salvo's [the broker] testimony to the effect that 'sub details' meant placing the agreed terms of the fixture in

the form and eliminating the inapplicable ones. . . . In short, according to De Salvo, 'sub details' meant filling in the blanks—not reviewing the whole negotiations again." There is no such underlying testimony in this case.

Furthermore at no point was it suggested that the GENJAPSCRAP form charter party was a mere blank filling exercise. Indeed, an examination of such a charter, (A. 150a), demonstrates that it was not susceptible to filling in blanks and the form itself contains many substantial deletions and interlineations. As gleaned from Mr. Pettersen's testimony as quoted *supra,* p. 18, 19 if he felt compelled to communicate with his principal in order to obtain approval with regard to these "sub-details", then this case is not within the framework of the *Interocean* decision.

Additionally, it is clear from a reading of the *Interocean* case that the *telex* (set forth at footnote 3 of page 531), *did not contain any subjects.* The Court's discussion of the words "sub-details" related to *notes* of De Salvo and this Court held at page 535 that the inconsistencies between Mr. De Salvo's notes and the telex were mere clerical errors, not evidence of lack of agreement. In our case, Mr. Kerwin, Mr. Pettersen, Mr. Avraamides and Mr. Traa were all in agreement that there were subjects and indeed the subjects were mentioned in the telex.

Although the Court below reviewed the matter of accepting the form of the GENJAPSCRAP charter and found that Atlantic had "no problems" in accepting it, including the provision for paying the extra insurance premium, the evidence is not clear that said form was in fact accepted by plaintiff. In this regard we have the above quoted testimony of Mr. Avraamides that no agreement was ever reached with regard to the subject details, (A. 79a, 85a). Mr. Traa testified that he had no discussion

of the GENJAPSCRAP terms with Mr. Pettersen as "we didn't get into the details at all because we were trying to get this sub-receiver's approval sorted out" (A. 100a). It is beyond any doubt that as of November 20th, there was no meeting of the minds, no binding, final agreement. A reading of the telex in question "leaves no doubt that it was intended not as the record of a consummated agreement, but merely as a memorandum of negotiations looking toward, but which had not resulted in, complete agreement." *Morecraft Transportation Corp.* v. *New York Ontario & Western Railway*, 1926 A.M.C. 719, 722 (S.D. N.Y. 1926). The very language of the telex, wherein it spoke of an "*eventual fixture*", clearly indicated that this was the case.

In *Univav, S.A.* v. *Molena Trust, Inc.*, 1973 A.M.C. 1386, (S.D.N.Y. 1973) the Court was faced with a similar situation wherein after a series of telex exchanges the parties had reached agreement as to some terms of a charter party, but had left others open, ". . . otherwise all terms and conditions of our present c/p's to apply."

The Court reasoned as follows:

> The record reveals that as of July 7, 1972, after the meeting and exchange of telexes, there were several issues left unresolved. The rate of overtime on the extension of the three existing charter parties and on the new charter party for the *Alida Gorthon* is a major area not resolved. Other items include insurance rates, restricted areas of travel, speed and fuel consumption. It is basic contract law that a contract is made when the parties have agreed upon all material terms. Corbin on *Contracts*, Vol. 1, section 82, p. 349; section 95, p. 394. Thus, the Court is confronted with the issue of whether or not, in the context of negotiations for a charter

party, an agreement on overtime is a material term, without which there is no contract.

* * *

The issue of whether or not there ever was a charter for the *Alida Gorthon* between the plaintiffs and the defendant is governed by principles of contract law, and the "acceptance" alleged by plaintiffs to be found in defendant's telex of July 6, 1972 was subject to a major condition or reservation, namely the material issue of overtime. No agreement could have been reached until such a condition or reservation had been withdrawn or satisfied, *Iselin* v. *United States,* 271 U.S. 136. The telex exchanges of early July, 1972 did not therefore constitute an enforceable or binding contract between the parties. *There was no contract if the parties failed to agree on all the essential terms* and one such term in the context of this instance was overtime rates. See *Interocean Shipping Co.* v. *National Shipping & Trading Corp.,* 1972 A.M.C. 1687, 1691, 462 F. (2d) 673, 676 (2d Cir., 1972), citing *V'Soske* v. *Barwick,* 404 F. (2d) 495, 500 (2 Cir., 1968), cert. denied, 394 U.S. 921 (1969); and *Ginsberg Machine Co.* v. *J. & H. Label Processing Corp.,* 341 F. (2d) 825, 828 (2 Cir., 1965). In the *Interocean* case, supra, the Second Circuit stated that whether the insurance clause and the "delivery range" of the ship were essential could only be determined upon a hearing. Here, the Court concludes, after a trial on the merits, that the overtime rate issue alone was an essential term and, unresolved, precluded a meeting of the minds of the parties in July, 1972. (1973 A.M.C. at 1389, 1391) (emphasis added).

In the present case, the record clearly shows no agreement with regard to extra insurance on November 20th,

nor any negotiation, let alone agreement of the myriad of important details to be resolved using a GENJAPSCRAP form as a starting point.

Finally, this Court in the *Interocean* case considered it "significant to note" that the dispute therein was probably attributable in part to the charterer's desire to unburden itself of an economically disadvantageous charter in a period when the tanker market had fallen drastically (523 F.2d at 533, n.5). In the present case, however, the evidence shows that it would have been more favorable economically for Tidewater if the receiver had approved the MARY. Since Tidewater was compelled to keep the PROMETHEE and Mr. Traa in reserve on the chance that the MARY might prove to be unacceptable to the receivers, it was forced to forego, according to the testimony, the carriage of an outbound cargo of grain from Chicago to Avonmouth, England (A. 73a, 99a, 105a). It was the testimony of Mr. Avraamides and Mr. Traa that had the PROMETHEE carried this cargo, Tidewater's profit would have been approximately $137,000 (A. 72a, 76a, 186a). Therefore, Tidewater would have much preferred that the MARY perform this voyage, releasing the PROMETHEE to take advantage of the lucrative end of season market for cargoes out of the Great Lakes (A. 98a).

Tidewater respectfully submits that the Court below made an erroneous conclusion of law as well as an erroneous finding of fact in holding that the telex of November 20th from Atlantic's broker to Tidewater constituted a binding contract between the parties. Such a finding must have surprised the plaintiff's counsel, as in the conclusion of their post trial memorandum they "respectfully submitted that there was a binding fixture of the vessel MARY on November *22,* 1974 . . ." (A. 122a).

POINT III

The approval of the receivers was a condition precedent which was not fulfilled.

Not only is it clear that the parties considered the receiver's approval of the vessel to be a condition precedent to any binding agreement, as indicated by both their words and conduct, but it is equally clear from the record that this condition precedent was never satisfied. It was the undisputed testimony of Mr. Avraamides that on either November 21st or 22nd he was called into the office of Mr. Waisfisz where he consulted with two representatives of the Chimbote receiver, Messrs. Molina and Zegarra, concerning the availability of a suitable vessel to carry the cargo under the receiver's C&F contract with Steelmet Export and Thyssen, Inc.

Mr. Avraamides stated that:

> "A. . . . I said yes, I have a ship. I gave them the details of the MARY, the lay dates, which was November 27, 28, December 9. I give them the age of the vessel, and I warned them that it would be a penalty on extra insurance. Then they said whether I had another vessel.
>
> Q. Who said that? A. One of the two representatives. And Mr. Waisfisz said that we have a ship which is on time charter to us. It's in Detroit very soon, and she will be in Jacksonville the end of November. Mr. Zegarra had a little conference in Spanish with him—
>
> Q. With whom? A. Mr. Molina. —and they said they wanted the PROMETHEE to perform this voyage.
>
> The Court: When was this happening?
>
> The Witness: On November 21, late in the afternoon, or the next day, because these people

> they were in our office for about ten days. But not on November 20 they were not in our office." (A. 70a)

Mr. Zegarra confirmed the conversation at that meeting in his deposition where the following ensued:

> "Q. Specifically, did Mr. Avraamides tell you and Mr. Molina that two ships were available to carry the cargo? A. We were told that two vessels which were about to reach port would be available, and that the material would be shipped at the end of the month or early December at the latest.
>
> Q. Specifically, did you or Mr. Molina tell Mr. Avraamides to ship the cargo aboard the vessel which would arrive first in Chimbote? A. Yes, for the purpose of our trip was to check the material and to demand that the shipping date would be complied with. We tried to make this the earliest possible date." (A. 17a)

Therefore Judge Metzner's statement in his opinion to the effect that the receiver was never asked to approve the vessel (A. 141a) is contradicted by the undisputed testimony of both Tidewater and the receiver. It is noted that Atlantic had every opportunity to serve cross interrogatories upon Mr. Zegarra, but declined. Furthermore it should be emphasized that at no point in the November 20th telex nor in the negotiations preceding that telex, did Tidewater guaranty that they would obtain the receiver's approval.

The characteristics of both vessels were reported to the receiver's representatives from Chimbote. The PROMETHEE, a French flag vessel, was clearly a more suitable vessel. She was 15½ knots, the MARY, a Greek flag vessel, was 11 knots. She was 7 years old, the MARY was 17

years old. She had her bridge aft, the MARY's bridge was between holds 2 and 3, and since both vessels were gearless and had to be discharged by shore cranes, the MARY's bridge was an obstruction to the operation of the cranes. The PROMETHEE could be loaded in all her 5 holds, whereas the MARY could not load in one of her 5 holds. The deadweight capacity of the PROMETHEE (10,389 tons) was compatible with the cargo of 9,375 tons, the MARY's capacity (14,783 tons) was not compatible with such cargo, and she would not readily come down in the water to her plimsoll marks, presenting a higher profile to the shore cranes and the winds on her voyage (A. 146a, 150a, 162a).

Therefore, it is clear from the evidence that for a number of logical reasons the receivers decided to withhold their approval of the MARY in favor of the PROMETHEE. Thus an express condition precedent of the contract was never fulfilled and it is an elementary principle of contract law that if a condition precedent is not satisfied, there can be no contract.

POINT IV

The details of the GENJAPSCRAP charter were conditions precedent which were not fulfilled.

The November 20th telex reflected the agreement of the parties up to that point with respect to freight rate, lay days/cancelling period, load and discharge rate and the type days on which the lay days would be calculated, and also demurrage and dispatch rates. The GENJAPSCRAP charter form (Plaintiff's Ex. 4 A. 150a) was to be used as the "basis" for further negotiation. We regret that this detailed form could not be reproduced more clearly, but among the matters that remained for negotiation were the extent of owner's responsibility for the stowage of the

cargo (Clause 2 of the charter), the scope of liens (Clause 8), the form in which bills of lading were to be signed (Clause 9), details as to the amount of notice to be given in the event the vessel did not reach loading port before the cancelling date (Clause 11), the General Average provision (Clause 12), the rights and responsibilities of each of the parties with respect to strikes, the rights and responsibilities of the parties with respect to shifting to berths and related expenses (Clause 16), what time periods were to be included in the laydays (Clause 19), when time was to commence counting (Clause 20), the extent of the owner's warranty with respect to the vessel's deadweight and cubic capacity (Clause 23), responsibility with respect to the condition of the vessel's holds and protective devices for bulkheads and tank tops (Clause 2 ether the charterer would have the right to load an charge with magnets (Clause 30), the responsibility for paying additional insurance on account of various conditions of the vessel (Clause 33), the details of the rights and responsibilities of the two parties with respect to stevedore damages (Clause 35), the condition in which the vessel must present itself for loading (Clause 40), the extent to which the Master would be required to issue bills of lading under charterer's direction (Clause 42), and guarantees with respect to the vessel's draft (Clause 47).

The mere recitation of the foregoing outstanding matters demonstrates that much important negotiation remained. It can also be seen from an examination of the charter as well as other charters made by Atlantic which are a part of the record, that such charters, although based on a particular form, are full of interlineations, modifications, alterations, additions and subtractions. The strike clause alone is of vital importance as a vessel can be partially loaded or discharged in a strike-bound port

and immobilized for weeks and in some instances, months. The lien clause is another vital clause from both owner's and charterer's viewpoint. The stevedore damage clause, particularly with a steel scrap cargo, is a hotly negotiated clause, with stipulations sought by one party or the other, since damage to the vessel may amount to tens of thousands of dollars. Similarly the use of magnets bears a relationship to such stevedore damage, since the de-energizing of the magnet from a height above the vessel's tank tops may seriously damage or puncture such tank tops. It has already been seen that the extra insurance clause involved the sum of approximately $6,000 and, therefore, was of consequence to the parties. The negotiation of such clauses is conducted by experienced businessmen trying to obtain the best possible bargain through their broker intermediaries. The matters on which the parties in this case had not reached agreement, as briefly outlined above, were in the aggregate, and in most of the above cited clauses, substantial matters affecting the prospects of profit and loss on the voyage and substantial rights of the parties in the event of accidents, strikes and damages to the vessel.

POINT V

The Court below was in error in relying on multiple hearsay erroneously received as evidence.

Judge Metzner's decision in this case contained findings that (a) the receiver allegedly had no intention of getting involved in the charter party, since it had no obligation to do so under a C&F contract, and (b) if the receiver had an obligation to give its approval of the MARY, that approval would have been given on November 21st (A. 141a, 142a).

The only evidence offered at the trial in support of the above were two telexes (A. 156a, 160a), in which Atlantic's agent in Peru responded to Atlantic's inquiry of November 21st (A. 154a) concerning the reason the receiver's approval was being withheld. As we have noted above, the information furnished by Atlantic to suggest that its vessel was "ideal" excluded unfavorable features, some of which are referred to in the so-called "fixture" telex. In both telexes, Atlantic's agent purported to relate the receiver's comments regarding its approval of the vessel.

When the first of these telexes were offered as evidence by Atlantic's counsel during the course of the trial, the following exchange took place:

> (40) Mr. Taliaferro: If your Honor please, I object to the receipt of this Telex. It was sent to Atlantic & Great Lakes by its agent; therefore it is self-serving.
>
> More basically, it is hearsay.
>
> The Court: Let me see it.
>
> Mr. Repetto: Your Honor, this Telex I would like to put in evidence now subject to other Telexes received by, or that were discovered in the files of, the defendant. And this Telex is subject to connection with the deposition evidence which has been filed with the Court of receiver's representative, Mr. Zavaleta.
>
> Mr. Taliaferro: I would respond to that, your Honor, by pointing out that the deposition evidence that he is referring to refers to receiver's representatives not from Lima, but who were associated with the Chimbote plant of the receiver. These apparently emanated from the Lima office.
>
> The Court: The same receiver, isn't it?
>
> Mr. Repetto: They are one company, your Honor.
>
> The Court: That's what I said.

Mr. Taliaferro: Nonetheless, your Honor, it is hearsay. He is offering it for the truth of the matter (41) stated therein, not just to show that it was merely sent or received.

Mr. Repetto: I am offering it for both.

We are dealing here with a question of whether a condition of a charter was actually met, and we are dealing with a matter of what we allege to have been a misrepresentation, and in getting evidence on that sometimes you are forced to hearsay.

Since the testimony of the receiver was sought by defendant and has been filed, I offer this subject to connection with that.

Mr. Taliaferro: In response, your Honor, I would point out, your Honor, that counsel for the plaintiff propounded no cross-interrogatories when we did depose the receiver's representatives, nor did he himself examine any representatives of the receiver in South America. And the Telex plainly states, "Receiver of cargo informed."

That, I submit, makes this the rankest hearsay conceivable.

The Court: What are you talking about?

Mr. Taliaferro: The third line, your Honor. The agent is purporting to relate something that it was allegedly told.

The Court: I will take it subject to connection. (A. 49a-51a)

However, the appellant has searched the record in vain for any connecting evidence offered by Atlantic. There is none. As such, Tidewater submits that admitting double hearsay testimony the Court was in error and clearly overstepped the bounds of its discretion.

Although the appellant is well aware that a trial judge has great latitude in exercising his discretion regarding

the admittance of hearsay testimony in a non-jury civil case, there are, nevertheless, well recognized limits to that discretion. As was aptly stated in Weinstein and Berter, *Evidence* §800 [03] (p. 800-17):

> "Appellate courts generally will not overturn a finding of fact by the lower court judge in a civil non-jury case where hearsay was improperly admitted *so long as there is sufficient competent evidence to support it.*"

The record contains no other evidence of any sort, let alone any other competent evidence, to support the lower Court's finding. As was noted by Tidewater's counsel, Atlantic had a full opportunity to depose the receiver's Chimbote representative by written cross-interrogatories on this point, but chose not to.

Since Atlantic's counsel himself admitted that the two telexes from its agent in Peru were hearsay, and since the Court permitted their introduction into evidence only subject to a connection which was never made, Tidewater submits that the admission of multiple hearsay was error on the part of the Court, and its receipt into evidence was obviously highly prejudicial to Tidewater's case, as evidenced by the lengthy discourse in Judge Metzner's decision as to the receiver's views on the question of approval. The sworn testimony of Mr. Avraamides and Mr. Zegarra confirmed that at the meeting in New York on or about November 22, 1974, the receiver's representatives from Chimbote opted for the faster and superior vessel PROMETHEE. Further, as noted above, the purchase order did require that the vessel be suitable for the intended cargo.

Tidewater must point out to this Court that during the trial when its counsel attempted to put important testimony into evidence, the hearsay objection of Atlantic's

counsel was sustained and indeed the Court interrupted the testimony of Mr. Avraamides (even though no objection had been made) stating "This is hearsay. Cut it out" (A. 71a, 74a). We respectively submit that the Court was in error in admitting the telexes of Atlantic's Peruvian agents, constituting multiple hearsay.

POINT VI

The Court below was in error in accepting plaintiff's damage calculations to find that the vessel would have earned a net profit of $62,746.55.

It is the position of Tidewater that the Court below was in error in finding that the computations in Atlantic's post-trial brief as to damages in the amount of $62,746.55 against Tidewater was supported by the evidence. On the contrary, a careful review of the record shows that Atlantic failed to support its consistent attempts to understate its projected expenses and thus maximize the net profit it would have made under the alleged charter party, and that it also failed to make a reasonable effort to mitigate its damages. For the sake of clarity, we shall discuss each of our objections to the plaintiff's computations separately below.

Net freight earned

Both parties agree that the net freight which the MARY would have earned had she performed this voyage would have been $263,935.55, arrived at by applying the rate of freight by the quantity of cargo less the broker's commission, all of which were set forth in the alleged "fixture" telex of November 20th (A. 148a, 150a). The computation would read as follows:

9375 L.T. x 29.25 less 3¾%,

or

$274,218.75 – $10,283.20 = $263,935.55

Rather, the issue before this Court is whether the evidence supports Atlantic's allowances for the expenses the vessel would have incurred in performing this voyage.

Loading at Jacksonville

It was admitted by Atlantic that its daily running costs while in port included the hire due under its time charter for the vessel ($4,200 per day), and its fuel costs, (7 tons I.F.O. at $75 per ton, or $525, and ½ ton M.D.O. at $110 per ton or $55.) (A. 115a). Therefore it is readily apparent that if, in its calculations, Atlantic minimized its estimated loading time for the MARY, its expenses would also be minimized, and accordingly, its estimated profits maximized.

The November 20th telex called for the exclusion of Sundays (i.e. from 1200 hrs. Saturday until 0800 hrs. Monday) and holidays from laytime, even if used, with regard to loading and discharging the vessel. Similarly, the GENJAPSCRAP form charter party such as that used for the ATLANTIC FREEDOM called for laytime to commence at 0800 hours on the working day *after* notice of readiness was given (A. 150a). Notice of readiness was to be given *within office hours* to charterers' (Tidewater's) agents.

However, in its calculations of loading time at Jacksonville, Atlantic chose to ignore the above terms, which were supposedly included in the alleged charter party. Specifically, the plaintiff assumed the MARY would tender its notice of readiness on Wednesday, December 4, 1974, and commence loading 9375 long tons of shredded scrap *that*

same day. At the rate of 2500 tons per day, it would then have loaded a total of 8750 long tons by noon on Saturday, December 7th, leaving some 625 long tons remaining, which it is presumed by Atlantic that the vessel would have loaded that Saturday afternoon (A. 113a).

Such assumptions on the part of Atlantic are blind speculation in an obvious attempt to establish some degree of damages, and said assumptions are directly contradicted by the evidence.

Although under the terms of the alleged charter party, laytime would not be charged to the defendant until 0800 hours on December 5th, the day after the vessel tendered her notice of readiness, Atlantic's counsel blithely assumes "that charterers would not have wasted a 'free' mid week day" (A. 113a). He also concludes "that the vessel would have been finished loading on Saturday", (A. 113a), i.e. would have finished loading on Saturday afternoon despite the fact that this period was excluded from laytime.

Such conjecture on Atlantic's part is controverted by the hard evidence adduced at the trial. Although Atlantic alluded in its brief to the fact that the PROMETHEE was loaded on Saturdays, it omitted Mr. Avraamides' logical explanation for this:

> "I was the shipper, I was the charterer, and I was the stevedore. I had the right to work any time I wanted, Sundays and holidays, in order to expedite my vessel. Q. And you worked that ship on the weekend? A. That's correct. Q. Have you ever worked anyone else's ship on the weekend? A. No. We never work—*when we charter vessels we never work vessels overtime except ours.* Q. Do you work other vessels overtime if the owner agrees to pay it? A. *Up to this point, I have been three years with this company, I have never had an owner approach*

> *me to work overtime.* . . . The PROMETHEE was my vessel and the MARY was not. *I didn't have any reason why I should work Saturdays, Sundays and holidays on the* MARY *in order for the owner to save money.*" (A. 87a, 88a).

Mr. Avraamides' explanation is simple. He worked the PROMETHEE weekends in order to minimize the daily hire expenses of its time chartered owner, Tidewater. He had no reason to save a third-party disponent owner such as Atlantic its expenses by working weekends or by commencing loading a day early.

Furthermore, Mr. Kerwin admitted that an owner cannot compel a charterer to work a vessel overtime, (A. 63a), and Mr. Traa confirmed this (A. 105a). Although Mr. Kerwin theorized that an owner could offer to pay the stevedores their overtime differential, the fact of the matter is that there is no evidence that Atlantic had the practice of doing so, and on the contrary, Mr. Avraamides testified unequivocally as quoted above, that in his experience no owner had offered to pick up overtime costs in order to expedite loading on days not counting as laydays (A. 87a-88a).

On the other hand, assuming the MARY would have worked the day notice of readiness was tendered and on the weekend if owners had paid the overtime, then Atlantic should have allowed for this in calculating its expenses. Mr. Kerwin admitted he did not (A. 63a), and such an allowance does not appear in plaintiff's post-trial brief.

Since by Mr. Kerwin's own admission Atlantic could not compel Tidewater to load the vessel on days not counting as laydays, and since the evidence clearly shows that Tidewater was not in the practice of voluntarily working these days, Atlantic's calculations as to the amount of time the

MARY spent in Jacksonville must be adjusted. Assuming the vessel tendered her notice of readiness during business hours on Wednesday, December 4th, loading would have commenced on Thursday, December 5th, leaving 3125 long tons still to be loaded by noon on Saturday instead of a mere 625 long tons, certainly no basis for any anticipation that Tidewater would work Saturday afternoon or Sunday. Rather, loading would have resumed at 0800 hrs. on Monday, December 9th, and would have been completed by about noon on Tuesday, December 10th.

The result would be that approximately 1½ days should have been added to the time Atlantic estimated the vessel would have spent at Jacksonville during loading, thus adding the following expenses to the overall voyage expenses:

Hire: $6,300 (1.5 days x $4,200 per day)

Fuel: $ 787.50 (1.5 days x 7 tons I.F.O. x $75)

$ 82.50 (1.5 days x ½ tons M.D.O. x $110)

$7,170.00

Therefore, the evidence establishes that Atlantic underestimated its expenses at Jacksonville by $7,170.00.

Steaming Time

Atlantic calculated that its steaming time in performing the voyage in question would have been as follows: St. Croix/Jacksonville (4.5 days); Jacksonville/Cristobal (5.75 days); Panama Canal (1 day); Balboa/Chimbote (4½ days) (A. 113a-114a). However, Mr. Kerwin conceded that the vessel would go against the current from the Canal to Chimbote, thus adding 1½ days to the trip (A. 60a-61a).

This was based on the MARY's maintaining a speed of 11 knots as warranted under its time charter; in perfect weather and suffering no breakdowns. However, in answering Supplemental Interrogatories the Atlantic admitted that it took the MARY 10.6 days (Dec. 31 1415 hrs.-Jan. 11, 0500 hrs.) to proceed from Mobile, Alabama to Matanzas, Venezuela, (A. 18a), a distance of 2,313 miles. At a speed of 11 knots, or 264 miles per day, a voyage of this distance should have taken only 8.76 days. It can thus be seen that the vessel maintained a speed considerably less than that used by the Atlantic in estimating steaming time:

Distance Mobile/Matanzas ÷ Steaming Time ÷ 24 hrs
=speed

2,313 ÷ 10.6 ÷ 24 = 9.09 knots

In view of the above, it is reasonable to assume that the vessel's steaming time would have been *increased,* particularly when one considers that the MARY at about the time in question made only 9.1 knots while steaming south to Venezuela, where, according to Mr. Kerwin she would have encountered a *following* current which should have caused her speed to *increase* (A. 60a). Although Mr. Kerwin estimated that the vessel would have been steaming *against* the current from Balboa to Chimbote, and he admitted that this would have *slowed* the vessel down by at least a day and a half, (A. 60a-61a), he did not adjust her steaming time accordingly, apparently because he felt that steaming with a following current from Jacksonville to Cristobal would have increased her speed by about the same amount. However, as the evidence clearly indicates, at about the time in question the MARY made considerably *less* than its warranted speed despite the fact that it had a *following* current. As such there is no justification for the plaintiff not taking into consideration reductions in

speed due to sailing against the current, and by Mr. Kerwin's admission *at the very least* 1½ days should have been added to the total steaming time, thus increasing Atlantic's expenses as follows:

Hire: $6,300 (1.5 D x $4,200)

Fuel:

I.F.O. $2,137.50 (1.5 D x 190 tons per day x $75 per ton.)

M.D.O. $ 82.50 (1.5 D x ½ ton per day x $110 per ton.)

$8,520.00

In fact, all that Atlantic has shown is the speed the MARY was *supposed* to make under its time charter party. The only evidence on the record shows the vessel as maintaining a speed of 9.1 knots rather than the 11 knots she had warranted. Her entire steaming time (other than the agreed one day transit for the Panama Canal) must be increased as set forth below, assuming, as Mr. Kerwin apparently did, that since the distances are approximately equal, the time spent steaming *with* the current to the Panama Canal and the time spent steaming from the Canal to Chimbote *against* the current cancel each other out:

	11 knots	9.1 knots
St. Croix/Jacksonville 1194 nautical miles	4.5 D	5.5 D
Jacksonville/Cristobal 1516 nautical miles	5.75 D	7 D
Panama Canal	1 D	1 D
Balboa/Chimbote	4.5 D	5.3 D
	15.75 D	18.8 D

At a speed of 9.1 knots, therefore, the vessel's total steaming time should have been 3 days longer than calcu-

lated by Atlantic, (i.e. 20 days rather than 17, A. 115a), increasing its expenses accordingly:

Hire: $12,600 ($4,200 x 3 D)

Fuel: $ 4,275 (19 tons I.F.O. x 3 D x $75 per ton)

$ 165 (½ tons M.D.O. x 3 D x $110 per ton)

$17,040

In conclusion, the only evidence indicates that the MARY was not capable of 11 knots, but only 9.1 and as such, steaming time and its corresponding expenses to the owner must be increased.

Port Charges

Mr. Kerwin in his testimony gave the total port charges which the vessel would have incurred at $13,000 (A. 59a). Atlantic admits this total is only an estimate based on Mr. Kerwin's prior experience and contends there is no evidence to dispute its accuracy, ignoring the fact that Mr. Avraamides testified (A. 76a) that the PROMETHEE incurred *actual* port charges of $16,400 in performing the voyage in question. The MARY, a larger vessel, would have had proportionately higher port charges. Also, since it was not under time charter to Tidewater and would have had no reason to expedite loading or discharging as the PROMETHEE did, it would have remained in port longer, incurring higher port costs, (A. 76a). Not only is Tidewater's calculation as to total port charges supported by hard evidence, but it is a conservative calculation as well. Therefore, plaintiff's port charge estimate should be increased by a minimum of $3,400.

Discharging at Chimbote

In its brief Atlantic again presumed that the MARY would have discharged around the clock, including weekends and holidays (A. 114a). Again, Atlantic ignored the fact that the alleged charter party specifically excluded both weekends (1200 hrs. Saturday-0800 hrs. Monday) and holidays (1200 hrs. day before-0800 hrs. day after). It did exclude Christmas and New Years day, but not from noon the day before until 0800 hrs. the day after, as the GENJAPSCRAP form calls for.

Apparently Atlantic relies on the fact that the PROMETHEE was discharged around the clock, including weekends and holidays to establish that it was the custom of the port of Chimbote to discharge in this fashion. However, it has chosen to overlook Mr. Avraamides' explanation as to why the PROMETHEE was worked on days not counting as laydays:

". . . they were working 24 hours, Sunday and holidays, in order to match the 800 tons per day. They couldn't do 800 tons per day and they were working holidays and Sundays." (A. 90a).

In other words, Mr. Avraamides testified that the reason the receivers took advantage of "free" days was to catch up with the discharge rate they were obligated to maintain in order to avoid demurrage expenses.

The experience of one vessel does not establish that it was customary at Chimbote to work weekends and holidays, around the clock. On the contrary, Mr. Kerwin himself testified that Sunday was a non-working day in Peru (A. 58a) and Mr. Traa, an experienced broker, was unaware of any such custom (A. 103a).

Furthermore, it must again be noted, that Atlantic had no control over the way the receivers chose to discharge

the vessel. Mr. Kerwin admitted this, and Mr. Traa also confirmed it in his testimony (A. 105a):

> "Q. Mr. Traa, can the owner of a vessel compel a receiver to work on Sundays or holidays? A. Not to my knowledge, no. . . . they couldn't compel anybody to work on those days." He also stated that "if they worked overtime on the weekend, then the ship would have to pay out disptach money, most likely."

Therefore it is clear from the record that (a) Atlantic failed to establish that it was a recognized custom of the port of Chimbote to work around the clock on weekends and holidays; and (b) Atlantic could not compel the receiver of the cargo to work these days; and (c) even if Atlantic's assumption is valid, Atlantic has failed to take into account the overtime it would have had to pay stevedores in calculating its voyage expenses.

Atlantic's contention is further belied by the facts of its own experience with the MARY in performing the substituted voyage from Mobile to Metanzas. Under the terms of the governing charter, the vessel was to lift 8200 metric tons of scrap. The charterer was given an aggregate total of 11 days to load and discharge. (see clause 18, Exhibit "B" annexed to Answers to Supplemental Interrogatories dated January 16, 1976, A. 12a). However, Atlantic has admitted that the vessel did not expedite loading and discharging, and in fact took nearly 26 days to accomplish these tasks (A. 18a, 64a). Thus, not only is there no evidence that receivers customarily work overtime to discharge cargo in South American ports, but on the contrary, the evidence suggests that cargoes are not normally discharged within the allowed laytime. At any rate, it is Tidewater's position that the Court below was clearly in error in accepting as fact Atlantic's contention that the MARY would have loaded and discharged in the

fastest way possible, resulting in maximum benefit to its owner, when it is absolutely clear from the record and admitted by Mr. Kerwin that Atlantic had no control over these operations.

Taking into consideration the fact that Atlantic has failed to establish that it was the custom of the port at Chimbote to work around the clock or weekends and holidays, that it could not compel receivers to do so and evidently was not of the practice of offering to pay overtime, and that neither receivers nor Tidewater had any reason to incur overtime expenses in order to save Atlantic its running costs, a reasonable estimation of the vessel's time at the discharge port, based on the arrival date at Chimbote of December 19th (the date plaintiff used in its brief) (A. 114a),[3] the length of the MAFFY's stay in Chimbote must therefore be adjusted. (The parties agreed that at a discharge rate of 800 tons per day, actual discharge would require 11.72 days):

Dec. 19—Thursday	Arrive
20—Friday	Tender Notice of Readiness
21—Saturday	Laytime commences 0800-1200 hrs.
22—Sunday	Not counting
23—Monday	0800-2400
24—Tuesday	0000-1200
25—Wednesday	~~0800-2400~~ Not counting
26—Thursday	0800-2400
27—Friday	0000-2400

[3] The December 19, 1974 arrival date must be adjusted as well, since as discussed, *supra*, Atlantic underestimated both its loading time in Jacksonville and its steaming time to Chimbote.

Dec.	28—Saturday	0000-1200
	29—Sunday	Not counting
	30—Monday	0800-2400
	31—Tuesday	0000-1200
Jan.	1—Wednesday	Not counting
	2—Thursday	0800-2400
	3—Friday	0000-2400
	4—Saturday	0000-1200
	5—Sunday	Not counting
	6—Monday	0800-2400
	7—Tuesday	0000-2400
	8—Wednesday	0000-2400
	9—Thursday	0000-2400
	10—Friday	0000-2400
	11—Saturday	0000-0400
		280 hrs. (11.75 days)

As such, discharge would not have ended until January 11, 1975 at the earliest, i.e. nine days later than Atlantic's estimation. The estimated voyage expenses would therefore have to be increased by:

Hire: $37,800 ($4,200 x 9D)

Fuel: $ 4,725 (9D x 7 tons I.F.O. per day x $75 per ton)

$ 495 (9D x ½ ton M.D.O. per day x $110 per ton)

$43,020

The return voyage in ballast

It is Tidewater's position that had Atlantic performed the voyage in question, it would have been left at Chimbote after discharge with no further business for the vessel, thus necessitating a return voyage in ballast through the Panama Canal to the U.S. Gulf. These expenses must therefore be included as necessary and incidental to the performance of this voyage. It was the uncontradicted testimony of Mr. Avraamides that the expenses of this return leg would have been about $63,000 (A. 76a, 186a), or more specifically $63,023.00 (A. 186a, p. 3). Of course, these calculations were based on the MARY maintaining her warranted speed of 11 knots, but as hereinbefore discussed, the only evidence on the record shows the vessel's speed as being substantially less than 11 knots, so Tidewater's calculation of the return voyage costs is conservative.

Although there was testimony that Atlantic expected to load concentrates in Peru for carriage to Europe, Mr. Pettersen's testimony was second hand and vague ". . . because the ships that I had chartered down to Peru on previous occasions would be nominated against those contracts." (A. 34a). Mr. Kerwin testified that the MARY would have been in a position to lift the final tonnage of ore concentrates on an ongoing contract during 1974 between Peru and Finland, but this alleged contract was never produced (A. 69a).

On the other hand, there was testimony with respect to the actual experience of the PROMETHEE in attempting to find a suitable cargo out of this area upon completion of discharge at Chimbote. Mr. Arvaamides testified that ". . . we attempted to get cargo out of Chimbote or out of any ports in west South America, and it didn't pay to employ the ship. For us, it was much more profitable to

send the ship in ballast into the Gulf or east coast United States." (A. 74a). Similarly, Mr. Traa, an independent broker, testified that he had reviewed Mr. Arvaamides' calculations of the MARY estimated expenses, including an allowance for this return voyage in ballast, and found that they were prepared according to generally accepted methods of voyage accounting (A. 93a-94a).

In short, Atlantic offered nothing concrete at the trial to support its argument that the MARY would have picked up an outbound cargo from Peru, whereas Tidewater offered testimony concerning the actual experience of the PROMETHEE that there was no suitable market in Peru or West Coast South American ports at this time. As such, under the generally accepted procedure of voyage accounting, the costs of the return voyage in ballast, $63,023.00 should have been included in Atlantic's estimation of its overall voyage expenses, and this alone eliminates its alleged net profit of $62,746.55.

Mitigation of damages

As noted above the only evidence of market conditions with respect to cargoes out of Chimbote came from Tidewater's witness and Atlantic failed to produce evidence of the market conditions or efforts to mitigate damages. Indeed it is noteworthy that Atlantic sent its vessel from the lower Caribbean all the way up to Halifax to cover an old in-house commitment under a charter party dated March 29, 1974 (A. 8a). This long ballast voyage was made to carry a cargo for a relatively short distance from Halifax to Edgewater, New Jersey. The vessel then after drydocking in Hoboken proceeded on a long ballast voyage to Mobile, Alabama, taking a cargo to Metanzas, Venezula (A. 12a), putting the vessel again in a position to load another "in-house" cargo from Brazil, which charter had been made July 12, 1974 (A. 10a). In other words

for internal reasons the vessel was not employed on the market, but to fill in on pre-existing in-house contractual commitments.

Summary of estimated expenses

At the trial below, there was some objection by the Court to Mr. Avraamides' presentation of the estimated voyage expenses (A. 94a-95a) in that his calculations were based on the vessel's estimated time of arrival in Jacksonville as per the November 20th telex (A. 148a). His calculations showed that had the MARY performed the voyage, Atlantic's net loss would have been $47,060.45. Since the ETA of the vessel was November 28th, Thanksgiving Day, the Court was apparently concerned that the defendant was attempting to include as many holidays (non-lay days) in its calculations and in effect maximize the plaintiff's expenses.

Rather than belabor the point, in his post trial brief Tidewater's counsel recalculated Atlantic's damages based on the MARY's arrival at Jacksonville on December 9th, a Monday and the last permissible lay day provided for in the November 20th telex (A. 135a). In doing so he not only eliminated the Thanksgiving holiday from this estimate, but Christmas as well, since the vessel would have still been at sea. Again Atlantic's estimate showed a net loss to the plaintiff of $4,916.55, or $10,505.55 when one considers that Atlantic conceded it would have been obligated to pay an insurance penalty of $5,589.00.

In this brief, however, Tidewater has accepted Atlantic's arrival date at Jacksonville of December 3, (A. 113a) approximately midway between the two arrival dates previously used, and again, as set forth below, calculations yield a net loss to plaintiff. There can be no further objection, therefore, that Tidewater is attempting to maxi-

mize the number of non-laydays and the corresponding expenses to Atlantic, in its calculations. Using Atlantic's arrival date at Jacksonville of December 3, 1974, the following must be added to the plaintiff's anticipated expenses:

Loading at Jacksonville	$ 7,170.00
Steaming Time	$ 17,040.00
Port Charges	$ 3,400.00
Discharging at Chimbote	$ 43,020.00
Return Voyage—U.S. Gulf	$ 63,023.75
	$133,653.75

Thus Atlantic's anticipated "profit" must be revised and converted in to a "loss" as follows:

Net Freight Income		$263,935.55
Less: Plaintiff's Estimated Expenses	$201,189.00	
Added Expenses as per Adjustment	$133,653.75	
Net Loss		$ 70,907.20

CONCLUSION

It is respectfully submitted that the order and judgment of the District Court granting Appellee damages should be reversed and the complaint dismissed, with costs in this Court to Appellant.

Dated: New York, New York
May 16, 1977

Respectfully submitted,

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375—Affidavit of Service

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ATLANTIC & GREAT LAKES STEAMSHIP CORP.
Plaintiff-Appellee,
against
Steelmet Inc., defendant
against
Tidewater Terminals, Inc.,
Defendant-Appellant

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:

Kenneth Riccardi being duly sworn,

deposes and says that he is over the age of 21 years and resides at
28 21 West 12th Street, Brooklyn, N.Y.

That on the 16th day of May 1977 at
161 William Street, New York, N.Y.
he served the annexed Appendix and Brief for Appellant upon
Donovan, Donovan Walsh & Maloof
in this action, by delivering to and leaving with said Donovan, Donovan,
Walsh & Maloof 3 true copies appendix
2 true copies Brief thereof.

DEPONENT FURTHER SAYS, that he knew the persons so served as aforesaid to be the person mentioned and described in the said papers

Deponent is not a party to the action.

Sworn to before me, this 16th
day of May 1977

Kenneth Riccardi

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1979